Dockbuilders Local Union No. 1456 of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Underpinning and Foundation Constructors, Inc.) *and* Robert Heaney. Case 2–CB–13323

February 8, 1995

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On September 2, 1994, Administrative Law Judge Steven Davis issued the attached supplemental decision.[1] The Respondent and the General Counsel filed exceptions and supporting briefs. The Respondent and the General Counsel also filed answering briefs and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Dockbuilders Local Union No. 1456 of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO, New York, New York, its officers, agents, and representatives, shall make whole Robert Heaney by the payment to him of the amounts of backpay set forth below, less tax withholding required by Federal and state laws. Interest shall be computed and paid in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Further, the Respondent shall make whole Robert Heaney by payments of contributions on his behalf into fringe benefit funds in the amounts set forth below, plus any additional amounts due as set forth in *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Backpay

Period/Qtr.	*No. of Weeks*	*Hourly Total Pay Rate*	*Total Wkg. Hrs.*	*Wages*
1990/2d	.4	$23.66	16	$378.56
1990/3d	10.5	24.66	516	12,724.56
Total Backpay: $13,103.12				

Benefit Funds

Period/Qtr.	*Rate*	*Hrs. of Work*	*Amount*
	Welfare Fund		
1990/2d	$3.10	16	$49.60
1990/3d	4.04	438	1,769.52
Total: $1,819.12			
	Annuity Fund		
1990/2d	$1.85	16	$29.60
1990/3d	1.85	438	810.30
Total: $839.90			
	Vacation Fund		
1990/2d	$2.10	16	$33.60
1990/3d	2.10	438	919.80
Total: $953.40			

Leah Z. Jaffe, Esq., for the General Counsel.
William D. Frumkin, Esq. (Law Offices of Donald L. Sapir), of White Plains, New York, for the Respondent.
Daniel E. Clifton, Esq. (Lewis, Greenwald, Kennedy, Lewis, Clifton & Schwartz), of New York, New York, for the Charging Party.

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. On February 28, 1992, the National Labor Relations Board (Board) issued its Decision and Order in Case 2–CB–13323, published at 306 NLRB 492, directing that Dockbuilders Local Union 1456, of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO (Respondent or Union) make whole Robert Heaney for any loss of pay and other benefits suffered by him resulting from Respondent's unlawfully causing Underpinning and Foundation Constructors, Inc. (Employer) to refuse to hire Robert Heaney.

Thereafter, Respondent filed with the Board a motion for reconsideration and reopening, which was denied on July 2, 1992. On April 15, 1993, the Second Circuit Court of Appeals granted the Board's petition for enforcement of its Order.

On December 1, 1993, a compliance specification was issued. Respondent filed an answer, and on June 1, 1994, a hearing was held before me in New York City, at which the specification was amended. Briefs were filed by the General Counsel and Respondent.

[1] The underlying decision is reported at 306 NLRB 492 (1992).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The Respondent has excepted to the number of hours set forth by the judge in his Order. At the hearing in this matter, the Respondent stipulated to the method of calculation and amount of hours set forth by the General Counsel in his compliance specification. Those numbers were relied on by the judge in determining backpay for the discriminatee. The Respondent's attempt to contest those figures to which it stipulated at the hearing is untimely and barred by its earlier stipulation.

The Order is modified to clarify those amounts payable to the discriminatee himself and those amounts payable on his behalf to various fringe benefit funds.

Respondent disputes the backpay period, the General Counsel's use of the ''replacement employee'' theory, the amount of gross backpay, and the amount of interim earnings.

Background

A brief summary of the underlying decision is necessary in order to properly analyze certain defenses of Respondent.

Robert Heaney was a member of Respondent for about 35 years until 1990. On June 25, 1990, he was expelled from Respondent for refusing to pay a fine imposed for violating certain provisions of Respondent's constitution.

Heaney's son, William, was a foreman for the Employer at a construction site on West 4th Street in New York City. On June 28, 1990, upon learning that a drill rig was to arrive at the jobsite, he decided to hire his father ''to perform work in relation to that machine.'' 306 NLRB at 493. William advised Respondent's business agent that he intended to hire his father for that job. He told the agent that ''there was a drill rig coming in and I wanted to put my father on it.'' Id. The agent told him that he could not hire his father because Robert was no longer a member of the Union. As a result of this conversation, William did not hire his father for that job.

Gross Backpay

I. REPLACEMENT EMPLOYEE

The General Counsel used the ''replacement employee'' theory in determining the amount of gross backpay. Following Heaney's unsuccessful attempt to become hired by the Employer, the Employer assigned employee Owen Quinn to work on the drill rig. The Board agent testified that Quinn was used as the model to ascertain the hours Heaney would have worked, and the wages and benefits he would have received but for his failure to be hired.

Respondent stipulated that the formulas, pay rates, and hours of work set forth in the specification were accurate.

Respondent denied that Quinn was the appropriate person to use in order to determine the amount of money Heaney was entitled to. It asserts that Quinn was already on the job when he was assigned to work with the drill rig, and was not specifically hired for that job, as Heaney would have been. This distinction is without merit, as the issue is the hours of work engaged in by the person who performed work on the drill rig, not whether that individual was already on Respondent's payroll. The replacement employee theory is recognized by the Board as an acceptable measure in determining the gross backpay due a discriminatee. *3 States Trucking*, 252 NLRB 1088 (1980).

II. THE BACKPAY PERIOD

The start of the backpay period, June 28, 1990, the date that Heaney would have begun his employment, is undisputed. However, Respondent denies that the backpay period should end on December 2, 1990, as set forth in the specification.

Respondent contends that Heaney would have been discharged immediately upon his hire, and therefore the backpay period should end on June 28, because it would have become immediately apparent that he was not qualified to perform work in relation to the drill rig.

As support for this proposition, Respondent refers to the Dockbuilder Referral Registration form completed by Heaney in April 1994. The form asks the registrant to initial those boxes of the form which list ''skills that you possess.'' Heaney did not initial the box listing ''churn drill rig,'' which was the type of drill rig his son sought to hire him for. However, he did initial two other types of drill rigs, and other types of work.

Respondent argues that by not initialing the churn drill rig box Heaney admitted that he did not possess skills as to the churn drill, and thus reasons that (a) he was not qualified to perform work on the churn drill, (b) his lack of qualifications would have become immediately apparent, and (c) he would therefore have been summarily discharged on the first day of his employment.

I find this argument to be without merit. The referral card was completed nearly 4 years following the events at issue. Heaney credibly testified that he is qualified to work on churn drills, and has done so hundreds of times in the past. However, he did not initial that box because he no longer wanted to perform work on churn drills, as the work is dirty and strenuous. Indeed, Peter Thomassen, Respondent's official, testified that work on the churn drill is the most demanding of the drill rigs in that it requires strength in carrying timbers, and is a ''very dirty, messy job.'' Thomassen conceded that an individual may not initial a particular box, indicating that he did not wish to be referred to such work, even if he was qualified to perform that work.

Accordingly, I cannot find, based on the referral registration form completed in 1994, that Heaney was unqualified to perform work on the churn drill in 1990.

As set forth above, the specification sets forth December 2, 1990, as the cutoff date for backpay. Quinn, the replacement employee, worked at the West 4th Street jobsite until September 20, and was then transferred to other jobs operated by the Employer until his layoff on December 2. The General Counsel argues, therefore, that Heaney, following the completion of the West 4th Street job, would have been similarly transferred to other jobs, and laid off on December 2.

Respondent argues that the proper cutoff date is September 18, 1990, when the drill rig was removed from the jobsite. Quinn's last day of work at the jobsite was September 20.

The General Counsel argues that it would have been likely that Heaney would have been transferred to other jobs based on the fact that of 21 employees employed at West 4th Street, 16 were in fact so transferred. She argues that the five not transferred worked only briefly for the Employer on the West 4th Street project: Howard, 1 day; Coggins, 2 days; and Dean, 2 days. As to the other two, Seda worked 14 days on the project, and Secor retired in late June. Accordingly, the General Counsel argues that since Heaney would have been employed from June 28 until the end of the project on September 18, a period of 82 days, he would also have been transferred to other jobs.

The work records of the 16 who were transferred reveal that they were employed on the West 4th Street job from 1 to 98 days.[1]

The General Counsel thus argues that the critical factor in determining whether an employee would have been transferred was the length of time he had been employed at West 4th Street, and since Heaney would have been employed there the same number of days as Quinn, 82, he would have been transferred. She explains that Howard, Coggins, and Dean were not transferred because they were employed a maximum of only 2 days.

Respondent disputes that that is the correct standard, and correctly notes that other employees, Doncaster and Minsky, were transferred even though they worked only 1 day each. Respondent further notes that Seda, who was employed for 14 days at West 4th Street, was not transferred.

Respondent proposes a different theory in order to determine whether Heaney would have been transferred to other jobs of the Employer. It argues that only those employees who were regular employees of the Employer were transferred to other jobs following West 4th Street, and since Heaney was not employed at all by the Employer in 1990, he would not have been transferred. Thus, all 16 employees who were transferred were employed at least during the period from January to May 1990 for the Employer with the exception of Doncaster, who was employed for only 3 days in March 1990; Flanagan, who was employed for 10 hours in April; and William Heaney and Bruce Olsen, who were not employed by the Employer at all in 1990 prior to the West 4th Street job.

Accordingly it appears that the General Counsel's and Respondent's theories are equally plausible but subject to exceptions. I accept neither.

In this supplemental proceeding, I am bound by the Board's findings, particularly as to the position Heaney was to occupy. In this regard, I believe that the only appropriate finding that may be made is that inasmuch as Heaney was hired specifically to perform work on the drill rig he would have been laid off on September 18 when the drill rig was removed from the West 4th Street jobsite.

Thus, Heaney was hired for a particular job—to perform work on the drill rig at the West 4th Street jobsite. As set forth above, the Board found that (a) William Heaney decided to hire his father ''to perform work in relation to that machine,'' (b) William advised Respondent's business agent that he intended to hire his father for that job, and (c) William told the business agent that ''there was a drill rig coming in and I wanted to put my father on it.'' Similarly, at the instant hearing, the Board agent who prepared the compliance specification testified that the Board found that Heaney ''would have been hired to perform a particular job. That is to operate the drill rig on this particular job.''

There is no evidence that Heaney was hired to perform any work other than work in relation to the drill rig at the West 4th Street site. It is too speculative to assume that, following his employment on the drill rig, the Employer would have transferred him to other jobs. Indeed, there is no showing that a drill rig of any type was used on jobs to which other employees, including Owen Quinn, were transferred to.

The use of Owen Quinn, as the replacement employee, to prove what hours Heaney would have worked had he been employed to work on the drill rig was appropriate. However, it is inappropriate to use Quinn to show that Heaney would have been transferred because Quinn was so transferred. Quinn was a longterm employee of the Employer, having been employed, virtually on a full-time basis, every week from January 1 through December 2, 1990.

In this regard, a proper comparison between him and Heaney cannot be made. As a steady, longterm employee of the Employer, it is likely that the Employer would have been more inclined to retain Quinn at the West 4th Street job following the removal of the drill rig, and to transfer him to its other jobs. Further, because Quinn was not hired specifically to work on the drill rig, he worked on other jobs at the West 4th Street site both before the arrival of the rig and after its removal.

It cannot be said, with certainty, that Heaney would have experienced the same treatment, especially in light of the facts that he had not been employed by the Employer at all in 1990, and he was hired specifically to perform work on the drill rig.

I accordingly find and conclude that the backpay period ends on September 18, 1990, the date the drill rig was removed from the West 4th Street jobsite.

III. INTERIM EARNINGS

Heaney did not work at all during the backpay period. He testified that during the backpay period he searched for employment by visiting Respondent's premises about three or four times per week, waiting to be assigned to work. He also registered at the New York State Employment Service, and called that office about two times per week. Heaney received unemployment compensation from the beginning of the backpay period until November 20.

Heaney wrote resumes to about two contractors and adjusters and was interviewed by one company. However, he was not hired, Heaney sent one or two resumes in response to newspaper advertisements. He received no interviews from that endeavor.

Heaney testified that he did not seek work from any union contractors in the industry because he did not have a union card. He conceded that although he could have solicited such employment, he would not have been hired when he revealed that he was expelled from the Respondent. This explanation is consistent with his experience in the unfair labor practice case where he was refused hire by a union contractor because he was not a union member.

Respondent contends that Heaney worked during the backpay period. In evidence are certain W-2 forms for 1990, which state that Heaney worked in that year, but do not give the dates of employment. Heaney testified that he worked for all five such companies prior to the beginning of the backpay period in June 1990. Respondent questions Heaney's credibility in the following regard. In April 1994, Heaney submitted a document to Respondent which stated that he last worked in May 1990. However, Heaney admitted working for Terra Drilling in 1992. He testified that he did not mention that job on the form because he worked as a nonunion employee, having been able to get the job because his son

[1] The following are the 16 employees transferred and the number of days they worked at West 4th Street: Caldiero 63; Doncaster 1; Evans 70; Flanagan 49; Fredericks 20; Haut 49; W. Heaney 98; Martin 70; McCarthy 43; Minsky 1; Murphy 43; Nylund 1; Bruce Olsen 49; Robert Olsen 70; Quinn 91; and Stewart 14.

was the foreman, and he believed that the question referred only to work performed as a union member.

Based on the above, Respondent has not met its burden of proving any diminution of the gross backpay based on interim earnings, or a willful failure to seek or hold interim employment. *Churchill's Supermarkets*, 301 NLRB 722, 725 (1991).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[2]

ORDER

The Respondent, Dockbuilders Local Union No. 1456 of the United Brotherhood of Carpenters and Joiners of America, AFL–CIO, New York, New York, its officers, agents, and representatives, shall make whole Robert Heaney by the payment to him of the amounts set forth below, less tax withholding required by Federal and state laws. Interest shall be paid, and shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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